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No. 96-423 (5)

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1996

RONALD COULTER AND ANNISA COULTER, et al.,

Appellants-Petitioners,

SHERRY HORTON, et al.,

Appellees-Respondents,

v.

METROPOLITAN LIFE INSURANCE COMPANY,

Appellee-Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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36 pp

LIST OF PARTIES TO THE PROCEEDING

It is unclear from the Petition for Writ of Certiorari if the judgment under review is that of the Findings of Fact and Conclusions of Law Regarding Motions to Intervene and to Dismiss Notices of Intention to Appear and Object of the United States District Court for the Middle District of Florida and/or the Opinion of the Eleventh Circuit Court of Appeals, Grilli v. Metropolitan Life Ins. Co., Inc., 78 F.3d 1533 (11th Cir. 1996).

Sherry Horton, Joyce Armbruster and Deborah K. Spamer, individually and on behalf of the settlement class certified by the district court, were the Plaintiffs in the district court and Appellees in the Eleventh Circuit.

Metropolitan Life Insurance Company, Inc. was the Defendant in the district court and Appellee in the Eleventh Circuit.

The Petitioners herein, Ronald Coulter, Anissa Coulter, Douglas Connor, Roena Connor, Darrin Johns, Joann Kablach, Eric Maharg, Terrance McConnell, Deborah Myers, Terry Palmer, Marjorie Palmer, Brian Rohm, James Romano, Mary Romano, Albert Darren Wise, Jeanne Yokel, Edward Beliunas, Paulette

Beliunas, John Brooks, Stephanie Charles, Shelly A. Daughenbaugh, Jerilyn Freiwald, Nina Heathcote, Daniel Heathcote, Robert W. Hemcher, Kenneth D. Johnson, Michele R. Johnson, Frieda E. Kamel, Jerome J. Knorr, Enod S. Knorr, George Liptak, Ruth Liptak, Kenneth J. Magnes, Sandra Maria McCue, Mark A. Ondrusek, Ernestine Peterson, Rori K. Rasel, Clarence Ridgeway, Emily N. Riehl, Joan C. Valenta, Robert Dale Wiles and Catherine Wiles, were not "parties" to the prior proceedings, as argued herein. They were putative intervenors, whose denial of intervention was upheld by the Eleventh Circuit Court of Appeals.

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JURISDICTION

Petitioners maintain that the jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Respondents herein dispute this jurisdiction, as set forth in the Argument section below.

STATEMENT OF CASE

The general procedural background of this case is set forth in the Eleventh Circuit's decision, Grilli v. Metropolitan Life Ins. Co., Inc., 78 F.3d 1533, 1535-37 (11th Cir. 1996). This case originated from a class action complaint filed by Respondents, Sherry Horton, Deborah Spamer and Joyce Armbruster (hereinafter Horton Respondents), on November 1, 1994. Their cause of action alleged that Respondent Metropolitan Life Ins. Co., Inc. (MetLife), by and through its agents, had engaged in deceptive sales practices in that it sold whole life insurance policies based upon representations that failed to disclose in whole or in part that the true product being sole was a life insurance policy. Claims were asserted, inter alia, under RICO and common law fraud.

Shortly after initiating the action and before a responsive pleading was filed, MetLife expressed its desire to enter into settlement negotiations with the Horton Respondents. Thereafter the parties engaged in vigorous and at times acrimonious settlement negotiations. Those negotiations culminated in a settlement

agreement, the terms of which were preliminarily approved by the federal district court on April 22, 1994.

The terms of the settlement agreement, as preliminarily approved by the court, provided for conditional approval of a class for purposes of settlement only consisting of:

> all persons who purchased a MetLife whole life insurance policy as a retirement and/or other savings plan or vehicle, based in whole or in part on written materials or other solicitations that allegedly did not fully disclose that these plans were life insurance products, from (a) the Rick Urso & Associates sales office (or its predecessor office) between January 1, 1988 and October 31, 1993, or (b) any other sales office of MetLife between January 1, 1990 and October 31, 1993.

The contents of the notice and proof of claim form were negotiated and ultimately agreed upon between counsel and presented to the court. The parties discussed the best method in which to identify potential class members based upon the circumstances of the case, the enormous number of MetLife policyholders, the difficulty in isolating those policyholders who may have been subjected to the questioned sales practices and the Horton Respondents' desire to

individually communicate the terms of the settlement to as many persons as possible. A step-by-step procedural formula to identify persons to receive individual notice was agreed upon and approved by the district court.

Thereafter, notice was sent to over 70,000 persons, approximately 20,000 of whom returned the proof of claim form. This was supplemented by publication notice in several national and regional newspapers and specialty journals, as approved by the district court.

A hearing to assess the fairness of the settlement was scheduled with the Florida federal district court for July 18, 1994. Prior to that hearing there began a series of filings precipitated by clients represented by Attorney Behrend. These included a motion filed by the Coulter Petitioners to intervene as named parties in the district court action for the unique purpose of severing not only themselves but all Pennsylvania residents, although they had no authority to speak for others. (App. 101a) The Coulter Petitioners also filed a Notice of Intention to appear and Object to the Settlement and those Objections were overruled by the district court

judge. (App. 83a) There were no significant objections to the settlement by persons other than those clients of Attorney Behrend. In their subsequent appeal to the Eleventh Circuit, the Coulter Petitioners did not appeal the district court's approval of the settlement itself. Grilli, 78 F.3d at 1537 n.6.

Petitioners then also filed Petitions to enlarge the time for exclusion or to declare that they were not class members. Each of these filings had to be addressed by the parties by responsive pleading.

The parties appeared for the settlement hearing and presented evidence to the court of the fairness of the settlement. The court also entertained the various motions advanced by Attorney Behrend up to that point and heard the objections to the settlement advanced by his clients.

Even subsequent to the fairness hearing and prior to the district court's entry of its order approving the settlement, Petitioners represented by Attorney Behrend continued to advance untenable positions to complicate and delay the settlement proceedings, including the filing of a Petition for an Injunction and

Remedial Measures based upon alleged improper communications by MetLife agents with potential class members.

Ultimately in October 1994, the district court entered its detailed Findings and Conclusions regarding the settlement and pending motions. (App. 83a) The district court denied Petitioners' Motion to Intervene. It also denied Petitioners' Request to file late exclusion forms to exclude them from the class action. It denied Petitioners' requested Petition for injunctive relief for improper communications. Finally, as for Petitioners' motion to declare they were not members of the settlement class, the district court appointed a special master and referred this request to the special master for case-by-case, fact specific determinations.

Petitioners next filed four appeals with the Eleventh Circuit Court of Appeals. Petitioners did not challenge the terms of the class action settlement itself in those appeals. Rather, they challenged the district court's denial of their Motion to Intervene, their Request to file late exclusions, their Petition for injunctive relief, and their Motion to declare that they are not members of the class.

This case proceeded through briefing and oral argument in the circuit court. In its reported opinion of April 2, 1996, the Eleventh Circuit not only upheld the district court's rulings, but found the appeals frivolous and ordered double costs and reasonable attorney's fees to appellees. Grilli, 78 F.3d at 1538-39.

Subsequent to the entry of the Eleventh Circuit's ruling, the Petitioners continued on with their court filings. They filed a first Petition for Rehearing with the Eleventh Circuit, challenging the court's award of sanctions and raising what they perceived as "factual and legal errors" with the Court's Opinion. This Petition attempted to reargue the merits of the appeals. The Eleventh Circuit denied this petition for rehearing. Petitioners then filed a motion for leave to file a Second Petition for Rehearing with the Eleventh Circuit, with tendered Second Petition. This Second Petition raised federalism and constitutional arguments as to the approval of the class settlement, similar to those in the question presented herein, but which were not previously raised in the circuit court. The circuit court denied the Motion for Leave to File Second Petition for Rehearing. (App. 75a)

SUMMARY OF ARGUMENT

This Court should deny certiorari. Petitioners herein lack standing to seek a writ of certiorari because they are not "parties" able to seek discretionary review under 28 U.S.C. § 1254(1). The Petitioners were denied intervention in the district court, this denial was upheld by the circuit court and, therefore, they are not named parties to these proceedings.

In addition, Petitioners seek discretionary review of matters beyond the scope of those properly raised and preserved for review. They did not seek review of their denial of intervention and now instead seek to raise constitutional challenges to the district court's approval of the underlying settlement in the case. Petitioners did not challenge the settlement in their appeal to the Eleventh Circuit and this was not the subject of the Eleventh Circuit's opinion. Subsequent to the entry of that opinion, Petitioners moved for leave to file a Second Petition for Rehearing to raise these new challenges to the settlement approval in the Eleventh Circuit. The Eleventh Circuit denied the request, having already heard the merits of the matters properly raised on appeal. Petitioners now seek to have this

Court consider those matters presented in the Second Petition for Rehearing denied by the Eleventh Circuit. This request is beyond the scope of matters properly preserved for appeal by Petitioners.

Finally, even a limited review of the contentions actually raised by Petitioners as being worthy of discretionary review reveals that review by this Court is not compelling. Contrary to Petitioners' legal argument, a federal district court's approval of a nationwide class action settlement pursuant to Federal Rule of Civil Procedure 23 does not violate principles of federalism or run counter to the McCarran-Ferguson Act. That Act is directed to conflicts between state law and Acts of Congress, not application of the Federal Rules of Procedure. No important issue of federal law is implicated.

The petition herein is simply a belated and legally erroneous attempt by the Petitioners to have this Court review the factual and legal findings of the district court when it ruled upon class settlement approval in order to allow Petitioners to continue on with their individual claims despite their failure to opt out of the class. This question was not properly preserved for appeal, nor are such inquiries intended to be addressed with the limited resources of this

Court. This Petition is pursued for the individual benefits of the Petitioners, who did not timely opt out of the settlement in order to pursue individual claims.

ARGUMENT

I. PETITIONERS LACK STANDING UNDER 28 U.S.C. § 1254(1) TO SEEK REVIEW OF THE QUESTION PRESENTED IN THE PETITION FOR WRIT OF CERTIORARI AND THEREFORE THE PETITION SHOULD BE DENIED.

Section 1254(1) provides that Supreme Court review of cases in the Court of Appeals can be sought upon Petition for Writ of Certiorari of any party to the proceeding. 28 U.S.C. § 1254(1). Both the district court and the Eleventh Circuit Court of Appeals denied Petitioners' Motion to Intervene as named parties to this action. One who is refused intervention as a party may seek review of that denial. See Robert Stern & Eugene Gressman, et al., Supreme Court Practice, § 6.16 (7th ed. 1993) (enumerating cases).

Supreme Court Rule 14.1(a) provides that

> [t]he statement of any question presented will be deemed to comprise every subsidiary question fairly included therein. Only the questions set out in the petition, or fairly

> included therein, will be considered by the Court.

Sup. Ct. R. 14.1(a). In their Petition for Writ of Certiorari, Petitioners failed to requested review of the lower court's denial of their intervention motion.

As this Court has previously held, review of a denial of intervention is not subsidiary to a stated question, but rather is a threshold inquiry. Izumi Seimitsu v. U.S. Philips Corp., 510 U.S. 27, 114 S. Ct. 425, 427 (1993). Nor can a challenge to the federal court's denial of Petitioners' Motion to Intervene be said to be "fairly included" in the single question set forth in the Petition.

As this court noted in Izumi, determining the propriety of the denial of a motion to intervene is both analytically and factually distinct from a question presented that is directed to the merits of the case. Id. Similarly, such as the case herein. Petitioners present to this court a question completely unrelated both factually and legally to the question of whether Petitioners should have been permitted to intervene as named parties in the underlying proceeding. In addition, while in their Petition for Writ of Certiorari Petitioners discuss the lower court proceedings on their

Motion to intervene, this alone is insufficient to bring this threshold question within the question presented for review. Id. at 427 n.5.

Nor is this the exceptional case for which Rule 14.1(a) should be disregarded. Respondents herein submit that the question presented by Petitioners does not fall within the realm of those matters for which this court has disregarded Rule 14.1(a). See id. at 428 (discussing those circumstances where this court has granted exception to the requirements of Rule 14.1(a)). This court expressly admonished those intervenors petitioning the Court of the need to properly comply with Rule 14.1(a) and thereby avoid requiring the Court to consider disregarding the Rule and reversing the denial of intervention in order to reach the actual question presented. Id. at 428.

Accordingly, Respondents respectfully submit that Petitioners herein are not named parties to these proceedings within the parameters of Rule 14.1(a) and have failed to seek review from this Court of the denial of their motion to intervene -- the sole issue for which they have standing.

II. PETITIONERS' QUESTION PRESENTED IS OUTSIDE THE SCOPE OF MATTERS RAISED BY PETITIONERS IN THE COURT BELOW AND THEREFORE THE PETITION SHOULD BE DENIED.

In the "Opinions Below" section of the Petition, it indicates that the opinions on review are the reported decision of the circuit court and the opinion of the district court. (App. 83a) The referenced district court opinion is actually its ruling on the Petitioners' Motion to Intervene. However, in this Court Petitioners now seek to challenge in their question presented and Petition the district court's approval of the class action settlement. While Petitioners argue the merits of this approval in their Petition, the Findings approving the settlement are not included in the appendix nor are they within the scope of matters properly raised for discretionary review.

There were four distinct appeals presented to the Eleventh Circuit. They were requests for review of the district court's decisions concerning (1) Petitioners' motion to intervene, (2) Petitioners' motion for late exclusion, (3) Petitioners' request for injunctive relief for restraint of improper contacts and for sanctions, and (4) Petitioners' motion to declare that they were not members

of the settlement class. The Eleventh Circuit affirmed the district court's denial of intervention, late exclusion, and injunctive relief, and the district court's referral of the motion for declaration of nonclass status to a special master. Grilli v. Metropolitan Life Ins. Co., Inc., 78 F.3d at 1536-37.

Petitioners sought to raise in the Eleventh Circuit, by way of Second Petition for Rehearing, issues of federalism and constitutional concerns over the district court's approval of the class action settlement. These matters were not raised as part of the original appeals that were timely filed and considered by the Eleventh Circuit. The Motion for Leave to File a Second Petition for Rehearing was denied. (App. 75a) The Eleventh Circuit did not consider nor rule upon the legal issues raised by Petitioners for the first time in their Second Petition for Rehearing.

Although the request to file the Second Petition for Rehearing was rejected, these new challenges to the district court's approval of the settlement were then raised by Petitioners in their Petition submitted to this Court. They seek in their question presented to resurrect those issues incorrectly presented to the

Eleventh Circuit for review and rejected by the Eleventh Circuit. These matters are outside the scope of those matters reviewed in the court below.

The question presented by Petitioners was not properly raised in the lower court and therefore this court should not now consider it. Delta Airlines v. August, 450 U.S. 346, 362 (1981). The matters involved in consideration of the question presented herein were not involved in the lower court and this court does not normally determine questions not so raised. Youakim v. Miller, 425 U.S. 231, 234 (1976); United States v. Mendenhall, 446 U.S. 544, 551-52 n.5 (1980); and Adickes v. Kress & Co., 398 U.S. 144, 147 n.2 (1970).

Accordingly, because the matters now sought to be raised by Petitioners before this court were not properly raised in the court below and preserved for review, this court should not now entertain consideration of the matters in the question presented.

III. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE IT FAILS TO ARTICULATE SUFFICIENT REASON FOR THIS COURT TO EXERCISE DISCRETIONARY REVIEW.

Arguing that they are parties to the Eleventh Circuit decision, Petitioners herein seek review under 28 U.S.C. § 1254(1). As set forth above, the question presented in the Petition was not actually part of the Eleventh Circuit proceedings nor do the Petitioners have standing to raise such a question. If this court nevertheless determines that these circumstances do not warrant denial of the Petition, the Petition should be denied because it fails to fall within the considerations prompting a review on a writ of certiorari as set forth in Supreme Court Rule 10. Indeed, the Petition fails to even address the specific considerations set forth in Rule 10 and it lacks clarity in its identification of reasons certiorari review is compelling.

In reviewing the Petition, Petitioners apparently argue that the actions of either the Eleventh Circuit or the federal district court in Florida conflict with other decisions of this Court and raise important federal statutory and procedural issues. These contentions are without merit.

Under Rule 10(a), one reason for granting certiorari may be where there is a conflict among the circuits, see e.g., Mitchell v. H.B. Zachry Co., 362 U.S. 310 (1960), or a conflict between a circuit court ruling and Supreme Court precedent. The actual decision of the Eleventh Circuit in Grilli v. Metropolitan Life Ins. Co., Inc., 78 F.3d 1533 (11th Cir. 1996) is not in direct conflict with a decision of any other United States Court of Appeals on those matters reviewed therein. The Eleventh Circuit properly reviewed those four matters brought before it on appeal --- propriety of the district court's denial of intervention, denial of Petitioners' request to file a late exclusion, denial of the petition for injunctive relief and referral of the motion to declare nonmember status to the special master. See id. at 1536-37. There has been no allegation that any of these rulings are in conflict with rulings of another circuit or this Court.

Under Rule 10(c), one reason for granting certiorari is where a United States Court of Appeals has decided an important question of federal law that should be settled by this Court or that conflicts with relevant decisions of this Court. Again, Petitioners have failed

to establish this in their petition nor can they because such circumstances do not exist in this case. The legal issues preserved for review and actually decided by the Eleventh Circuit do not involve important questions of federal law that should be settled by this Court. They concern review of fact specific issues ruled upon by the district court. Nor do the rulings of the Eleventh Circuit in its reported Opinion conflict with relevant decisions of this Court.

Thus, there is nothing within the reported decision of the Eleventh Circuit warranting discretionary review. Instead, Petitioners rely upon the same arguments set forth in their Second Petition for Rehearing as supportive of discretionary review. While these arguments were not properly raised and preserved for appellate review, a review of those arguments reveals that they also fail to satisfy the relevant considerations to warrant discretionary review. In their Petition, Petitioners raise essentially two arguments. First, that states have a strong interest in regulating fraudulent conduct of insurers in their state and second, that the district court's approval of a nationwide class action settlement pursuant to Civil Rule 23 constitutes a regulation of insurance sales in and among the states

violative of the McCarran-Ferguson Act, 15 U.S.C. § 1012, and principles of comity and state sovereignty.

Petitioners' first argument provides no foundation for granting discretionary review. Relying upon this court's decision in Pacific Mutual Life Ins. Co. v. Haslip, 499 U.S. 1, 111 S. Ct. 1032 (1991), Petitioners submit that states have a strong interest in regulating an insurer's fraudulent sales conduct within that state. Respondents herein have no reason to dispute this general legal proposition. Nor does the Eleventh Circuit's decision conflict with this general proposition. This general interest of states in regulating the insurance industry within their boundaries presents no special or important reason beyond the academic and hypothetical and therefore is insufficient to warrant discretionary review. See, Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70 (1955).

Petitioners' second contention is that the district court's approval of a nationwide class action settlement pursuant to Federal Rule of Civil Procedure 23 constitutes the regulation of insurance sales and that such regulation conflicts with the McCarran-Ferguson Act and principles of comity and state sovereignty. As with the first

contention, this second contention likewise provides no foundation for granting discretionary review.

In essence, Petitioners claim that this "decision" by the district court to approve the class action settlement, which was not part of the Petitioners' appeal to the Eleventh Circuit, conflicts with federal law and federalism concerns because it regulates insurance. In actuality, the Petitioners' contention that the lower court's approval of this nationwide class action settlement pursuant to Rule 23 constitutes the regulation of insurance is nothing more than the Petitioners' attempt to attack the lower court's approval of the class settlement. As noted, the Petitioners did not appeal the district court's approval of the negotiated settlement to the Court of Appeals. A grant of certiorari by this Court may be of great practical importance to Petitioners because they failed to promptly opt out and pursue their individual claims for damages specifically authorized under Pennsylvania law. However, this is not a sufficient reason for granting certiorari. See Ticor Title Ins. Co. v. Brown, 511 U.S. 117, 114 S. Ct. 1359, 1362 (1994).

As noted in the district court's Findings of Fact and Conclusions of Law Regarding Motions to Intervene and to Dismiss Notices of Intention to Appear and Object (App. 83a), the court assessed the adequacy and fairness of this settlement based upon federal procedural law (97a-98a), without the need to resolve constitutional limits under due process based upon application of state choice-of-law principles. Cf. Spector Motor Serv., Inc. v. McLaughlin, 323 U.S. 101, 105 (1944) (court should avoid passing upon constitutional issues unless unavoidable to do so.) It is within the authority of the district courts to review and approve such nationwide class action settlements pursuant to Rule 23. See, e.g., Miller v. Republic Nat'l Life Ins. Co., 559 F.2d 426 (5th Cir. 1977); Maywalt v. Parker & Parsley Petroleum Co., 864 F. Supp. 1422 (S.D.N.Y. 1994), aff'd, 67 F.3d 1072 (2d Cir. 1995); Bowling v. Pfizer, Inc., 143 F.R.D. 141 (S.D. Ohio 1992); In re A.H. Robins Co. (Breland v. Aetna Casualty & Sur. Co.), 85 B.R. 373 (E.D. Va. 1988), aff'd, 880 F.2d 709 (4th Cir.), cert. denied, 493 U.S. 959 (1989).

While Petitioners rely upon Georgine v. Amchem Prod., Inc., 83 F.3d 610 (3d Cir. 1996), cert. granted 1996 WL 480936 (Nov. 1, 1996) that decision is not applicable here, nor is the case herein directly in conflict with it. Georgine involves a challenge to a federal court's certification of a Rule 23(b)(3) class for purposes of settlement of mass toxic tort asbestos litigation. That case involved a properly preserved challenge to Rule 23 certification. The Third Circuit rejected the federal district court's certification of Rule 23(b)(3) class for settlement purposes, finding that the certification requirements were not met in that particular mass tort context. This Court has granted certiorari of that ruling. Nevertheless, the Eleventh Circuit's Opinion on the four issues raised on appeal before it does not conflict with Georgine. In addition, Petitioners did not appeal to the Eleventh Circuit the district court's approval of settlement, nor does this case deal with class certification issues in the mass tort context. Instead, and according to the Petitioners' question presented, the circumstances herein involve the regulation of insurance, not mass tort litigation.

In their Petition, Petitioners point to virtually no authority to support their position that approval of a nationwide class action settlement in this case constitutes the "regulation of insurance," other than their own conclusory statements. Petitioners try to analogize this case to authorities which are not on point. Petitioners cite F.T.C. v. National Casualty Co., 357 U.S. 560 (1958) to support their position that approval of a class action settlement constitutes a regulation of insurance sales. In that case a specific federal agency, the Federal Trade Commission, attempted to directly regulate the advertising practices of insurance companies by express orders. This is obviously a direct regulation of insurance quite different from the circumstances herein. The court is not a federal commission, nor is there any direct and express attempt to impose specific regulation on a nationwide basis upon the insurance industry as in National Casualty Co. The negotiated class action settlement in this case for the payment of 100% restitution to class member policyholders does not, either directly or indirectly, constitute a regulation of insurance industry practices, nor has the court's

approval of the settlement of this case in any way infringed upon the states' ability to regulate insurance practices.

Nor can the federal district court's approval of settlement pursuant to federal procedural law and specifically Rule 23 be considered as conflicting with or violative of the McCarran-Ferguson Act, assuming arguendo that Petitioners' characterization as regulation of insurance sales had some merit. The Act provides that:

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State, for the purpose of regulating business of insurance...

15 U.S.C. § 1012(b). Rule 23 and the federal procedural law regulating class actions is not an "Act of Congress."

The only relationship that the McCarran-Ferguson Act bears to these proceedings is as to the question of subject matter jurisdiction. This action originated as a RICO claim, 18 U.S.C. § 1962, with supplemental state law claims. Prior to considering approval of the class action settlement, the district judge asked the parties to address whether the district court had jurisdiction to

consider approval of a class action settlement, as Respondent MetLife contended, if the McCarran-Ferguson Act preempted that RICO claim. As these Respondents noted to the district court, there is authority supporting the proposition that the McCarran-Ferguson Act would not preempt the RICO claim, see, e.g., Merchants Home Delivery Services, Inc. v. Hall & Co., 50 F.3d 1486, 1489 (9th Cir. 1995), cert. denied Prometheus Funding Corp. v. Merchants Home Delivery Services, Inc., 116 S.Ct. 418 (1995), and that the RICO allegations advanced by Respondents presented a colorable claim sufficient to invoke the district court's subject matter jurisdiction, see Angela R. by Hesselbein v. Clinton, 999 F.2d 320, 324 (8th Cir. 1993), even where that federal claim may later be dismissed. Nelson v. Greater Gadsden Housing Auth., 802 F.2d 405, 408 (11th Cir. 1986). In its Findings of Fact and Conclusions of Law Regarding Fairness of Class Action Settlement (which Petitioners appropriately have not included in their appendix, although their Petition inappropriately challenges the merits of those findings) the district court found it had subject matter jurisdiction to approve the settlement.

Nor does the additional authority Petitioners submit in their Supplemental Brief lend any further support to their position. In Seminole Tribe of Florida v. Florida, 116 S. Ct. 1114 (1996), this Court held that the Eleventh Amendment prohibits Congress from authorizing federal court suits by Indian tribes against states under The Indian Gaming Regulatory Act. Id. at 1133. Petitioners seek to rely upon this Court's emphasis in Seminole Tribe that the sovereignty of the states must be maintained and generically apply that emphasis to its argument that state sovereignty has been usurped by the Florida district court in violation of the McCarran-Ferguson Act. The Seminole Tribe decision and the case herein are not comparable. Petitioners mistakenly believe that the court's application of a Federal Rule of Civil Procedure can be violative of the McCarran-Ferguson Act. See Supplemental Brief, p. 5 ("we have the incongruous result of the insurance regulatory laws of the sovereign States being abrogated by a Federal Rule of Civil Procedure"). The Act is directed to conflicts between state and federal law (Acts of Congress) as to the business of insurance and the preemptiveness of federal law under those circumstances.

Petitioners further contend that this so-called regulation of insurance by approval of a nationwide class action settlement violates comity and state sovereignty, in conflict with the Supreme Court's decision in BMW of North America v. Gore, 116 S. Ct. 1589 (1996). While that case can be characterized as dealing with the general proposition of whether a judicial ruling can constitute state regulation, the specific holding of that case is not analogous. There, the specific award of punitive damages under Alabama law in an Alabama state court was held to infringe upon the ability of other states' rights to regulate business within their boundaries. In the case herein, the court assessed a negotiated settlement, not a specific verdict based upon application of a specific state law. The district court herein considered federal principles governing approval of class action settlement, not the assessment of specific damages under Florida or any other state law. The action of the court in approving this settlement is not an infringement on the states' rights or ability to regulate the insurance industry within each particular state. Therefore, this case is not in conflict with this court's reasoning or holding in BMW v. Gore.

Nor is Petitioners' reliance on Gregory v. Ashcraft, 501 U.S. 452 (1991), appropriate. That case involved a conflict between a Missouri constitutional provision and the ADEA and whether the federal law prevailed over the state constitutional provision given the Supremacy Clause. The concerns of state sovereignty in that regard bear no relationship to federalism concerns based upon a federal court's exercise of valid procedural laws.

CONCLUSION

Supreme Court Rule 10 provides that a petition for writ of certiorari is granted for compelling reasons. The Petitioners present no compelling reasons to support this Court's exercise of its limited judicial resources. Not only do the specific contentions raised by the Petitioners fail to raise important constitutional or statutory issues or directly conflict with rulings of this Court or any other circuit court, but Petitioners also have failed to properly preserve these issues for discretionary review and lack standing to present these issues before the Court. For these reasons, Respondents respectfully submit that the petition should be denied.

Respectfully Submitted,

BY: _____

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